



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CORAM: D.S. MAJANJA J.
CIVIL SUIT NO. 2 OF 2018
(FORMERLY KISII ELC NO. 106 OF 2017)

BETWEEN

ZABLON MOGAMBI MOGAKA.....1ST PLAINTIFF

ESTHER KEMUMA MOGAKA.....2ND PLAINTIFF

OURU POWER LIMITED.....3RD PLAINTIFF

AND

BANK OF AFRICA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiffs' case as set out in the plaint is that on 24th September 2013, they approached the defendant ("the Bank") with a request for a financial facility to enable them finance their wholesale and retail business. The Bank thereafter issued a Letter of Offer which was accepted by the plaintiffs. Under the Letter of Offer dated 24th September 2013, the Bank required the plaintiffs to offer securities to secure the financial facility. In this regard, the plaintiffs deposited the original title deeds in respect the properties; **KAJIADO/KAPUTEI/10874** and **LR 127115/8249** ("the Title Deeds").

2. According to the plaintiffs, on or about 25th October 2014, the Bank carried out a review of the facility and in accordance therewith the parties agreed that the plaintiffs would deposit logbooks for motor vehicles registration numbers KBR 151K and KBQ 746J ("the Logbooks") as securities. Further and on 18th November 2014, the plaintiffs' alleged that the Bank carried out another review of the facilities granted to the plaintiffs and under the review, the Bank offered to release the Title Deeds and Logbooks it was holding subject to the plaintiffs executing a letter of offer and a further charge over the properties; **KISII MUNICIPALITY/BLOCK II/3, 4, 5 and 6**. The plaintiffs aver that they executed the further charge in favour of the Bank but it only released the Logbooks for the vehicles but refused to surrender the Title Deeds. As a result, the plaintiffs sought the following reliefs:

a) *Declaration that the continued withholding and/or retention of the titles, over and in respect of **LR NO.S KAJIADO/KAPUTIEI/10874 & LR 127115/8249**, is irregular, illegal and unlawful.*

b) *Declaration that the Simple Deposit and/or surrender of titles in respect **LR NO.S KAJIADO/KAPUTIEI/10874 & LR 127115/8249**, was to subsist pending execution and/or perfection of Securities, in terms of the Review, which was duly complied with pursuant to and in line with the Baking Facility Letter, dated **18th November 2014**.*

c) *An order of Mandatory Injunction directed to and/or against the defendant, to forthwith release and/or surrender the title deeds over and in respect of **LR NO.S KAJIADO/KAPUTIEI/10874 & LR 127115/8249**.*

d) *Permanent injunction restraining and/or prohibiting the defendant herein either by herself, agents, servants and/or anyone acting under the instructions of the defendant, from alienating, selling, charging, mortgaging, encumbering, restricting and/or in any other way and/or manner dealing with the titles over and in respect of **LR NO.S KAJIADO/KAPUTIEI/10874 & LR 127115/8249** adverse to the interests and/or rights of the plaintiffs.*

e) *General damages*

f) Interests on (e) above at court rates.

g) Costs of the suit be borne by the defendant

h) Any such further and/or other relief as the honourable court may deem fit and expedient so to grant.

3. The Bank filed an amended statement of defence and counterclaim. It admitted the letter of offer dated 24th September 2013 and stated that it was a term of thereof that the facility granted to the 1st and 2nd plaintiffs was to be secured by a simple deposit of the Title Deeds. As regards the letter of offer dated 18th November 2014, the Bank stated that its only obligation was to release the original Logbooks after the 3rd plaintiff had executed a Further Charge over the properties; **KISII MUNICIPALITY/BLOCK II/3, 4, 5 and 6** and that it in fact released the Logbooks to the plaintiffs' agent. It denied that it was under any obligation to release the Titles Deeds.

4. The Bank's counterclaim was based on the banking facilities granted to the plaintiffs. Those facilities, granted by the Bank to the Plaintiff between 2012 and 2014, were admitted by the plaintiffs and were as follows:

a) Under the Bank's letters of offer dated 2nd November 2010, 24th October 2011, 22nd February 2012 and 15th May 2012 for term loans ("**TL1**") of Kshs. 263,697,481.12 advanced to the 3rd plaintiff as working capital.

b) Under the Bank's letters of offer dated 24th September 2013 for term loans of Kshs. 25,355,906.73 ("**TL2**") advanced to the 1st and 2nd plaintiffs for working capital requirements advanced to the 3rd plaintiff as working capital and a term loan of Kshs. 52,500,000 ("**TL3**") advanced to the 3rd plaintiff making a total of Kshs. 77,855,906.73/-.

c) Under the Bank's letters of offer dated 25th October 2014 where **TL2** that had been advanced to the 1st and 2nd plaintiffs was reviewed to Kshs. 30,000,000/-, an overdraft facility of Kshs. 50,000,000/= ("**OD**") was provided to the 3rd plaintiff and **TL1** and **TL3** that were advanced to the 3rd plaintiff were reviewed to Kshs. 120,000,000. The total outstanding balance on **TL1**, **TL2** and **TL3** as at 24th October 2014 was Kshs. 182,381,310/=.

d) Under the Bank's letters of offer dated 18th November 2014, **TL1** and **TL3** that were advanced to the 3rd plaintiff were further reviewed to Kshs. 101,423,627.19/- and **OD** facility of Kshs. 50,000,000 provided to the 3rd plaintiff remained unchanged. The total banking facilities availed to the 3rd defendant totaled Kshs. 151,423,627/-.

20. The said facilities were secured by a Charge and a Further Charge over the plaintiff's interests in **KISII MUNICIPALITY/BLOCK II/3, 4, 5 and 6** and a simple deposit of Title Deeds; **KISII MUNICIPALITY/BLOCK II/1**, Deed of Assignment of all rental proceeds over **KISII MUNICIPALITY/BLOCK II/3, 4, 5 and 6**; fixed debenture dated 22nd June, 2012 by the 3rd plaintiff to the Bank, deposit of Logbooks, individual personal Guarantee and Indemnity dated 18th February 2015 and issued by the 1st and 2nd plaintiffs to the Bank.

21. Following default on the aforesaid facilities, the Bank averred that as at 6th April 2017, the 3rd plaintiff as the principal debtor owes it a sum of Kshs. 211,186,493.48/= being the unpaid principal sum and interests on an aggregate sum of Kshs. 151,500,000 advanced to the 3rd plaintiff in the year 2010 and 2015. It further stated that as at 6th April 2017, the 1st and 2nd plaintiffs as joint principal debtors jointly owe it a sum of Kshs. 24,479,143.43/= being the unpaid principal sum, interest, costs, charges and expenses due in relation to the sums advanced by the defendant to the 1st and 2nd plaintiffs jointly.

22. The Bank averred that from December 2014 to date, the plaintiffs defaulted in their loan repayment obligation and despite several demands for payment, the payments have not been settled. The Bank also called up the personal guarantees and indemnities issued to it by the 1st and 2nd plaintiffs but in breach of the terms of their respective guarantees and indemnities, the 1st and 2nd plaintiffs failed to liquidate the debt owed to the defendant. The Bank therefore avers that as at 6th April 2017 the amount owed by the plaintiffs is Kshs. 235,665,636.91/- and it prayed for judgment as follows:

a) Judgment against the 1st, 2nd and 3rd plaintiffs for the sum of Kshs. 211,186,493.48/-;

b) Interest on (a) above, at the rates applicable to the facilities from 6th April 2017 until payment in full;

c) Judgment against the 1st and 2nd plaintiffs for the sum of Kshs. 24,479,143.43/-;

d) Interest on (c) above, at the rates applicable to the facilities from 6th April 2017 until payment in full;

e) Costs of this suit.

23. At the pre-trial conference the parties agreed on facts, documents and issues for determination. The 1st plaintiff (PW 1) testified on behalf of the plaintiffs and Felix Muhati (DW 1), a relationship officer within the Bank's Recoveries Department testified on behalf the Bank. Both parties filed written submissions to support their respective cases. Although several issues had been agreed by the parties, after hearing the matter I find that there are two issues for determination upon which consequential relief shall follow;

(i) Whether the Bank was obliged to release or surrender the titles for **KAJIADO/KAPUTIEI/10874** and **LR 127115/8249** held by

it on simple deposit.

(ii) Whether the Bank is entitled to judgment for the sum of Kshs. 235, 665,639.61 as prayed in the counterclaim.

24. I will not rehash the testimony of each witness as the parties agreed on the documentary evidence. I will refer to aspect of that testimony where it is necessary to resolve a factual issue.

Whether the Bank should release the securities held on simple deposit

25. The 1st and 2nd plaintiffs contend that they provided the Title Deeds under the Banks' letter of offer dated 24th September 2013 and that upon disbursement of that facility, the Bank did, following negotiations, issue several letters of offer, set out in paragraph 4 above, culminating in the letter of offer dated 18th November 2014.

26. The plaintiffs submit that the letter of offer dated 18th November 2014 superseded all the other letters offer including the one dated 24th September 2013. It is their case that under the latter letter of offer, the Bank was obligated to release the Title Deeds and as such the Bank was in violation of the terms of the agreement by failing to do so. The plaintiffs relied on the case of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR** where the Court of Appeal held that, "A court of law cannot re-write a Contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved." The plaintiffs maintained that the Bank was in breach of the agreement between it and the plaintiffs.

27. The Bank's position set out in its submissions was that the two letters of offer were distinct and were made to different persons. The letter of offer dated 24th September 2013 was issued to the 1st and 2nd plaintiffs while the letter of offer dated 18th November 2014 was issued to the 3rd plaintiff and although the 1st and 2nd plaintiffs were directors of the 3rd plaintiff and in that capacity signed the latter letter of offer, the Bank submitted that the parties were separate persons in law. Counsel for the Bank cited the case of **Salomon v Salomon [1897] AC 78** and **Victor Mabachi and Another v Nurturn Based Limited NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR** to support its case.

28. The resolution of this issue is a matter of interpretation of both letters of offer. I agree with the dictum of the court **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another (Supra)** that court should remain faithful to the agreement between the parties. Likewise, in **Jiwaji v Jiwaji [1968] EA 547**, the Court held that, "where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties."

29. Under the letter of offer dated 24th September 2013, the Bank offered the 1st and 2nd plaintiffs, a term loan of Kshs. 25,355,906 to be paid over a period to time with the last repayment date under Clause 8.1 being 30th September 2018. Under Clause 7 of the letter, the Bank was obligated to make disbursements after receipt of all security documents under Clause 9.1.2 which included simple deposit of Title Deeds.

30. The letter of offer dated 18th November 2014 was addressed to the 3rd plaintiff was in substance a restructuring of the term loan under which it acknowledged that it owed Kshs. 101,423,627/19 as at 1st November 2014 and was offered an overdraft facility of Kshs. 50,000,000/= . The letter acknowledged under Clause 9.1.1 that there were existing securities namely: a first legal charge over **KISII/MUNICIPALITY/BLOCK II/ 3,4, 5 and 6** registered in the name of the 1st plaintiff and a fixed debenture over of motor vehicles registration no. KBP 805Q and KBQ 746J. Under clause 9.1.2, the following new securities were acknowledged; a further legal charge over **KISII/MUNICIPALITY/BLOCK II/ 3,4, 5 and 6** to secure borrowing by the 3rd plaintiff and also the 1st and 2nd plaintiff; personal guarantees and indemnities by the 1st and 2nd plaintiff.

31. Having read the both letters of offers I find that the letter of offer dated 24th September 2013 was addressed to the 1st and 2nd plaintiffs. This is distinct from the letter of offer dated 18th November 2014 which was to the 3rd plaintiff. The latter letter of offer did not affect the terms and conditions of lending contained in the former letter of offer to the 1st and 2nd plaintiff. Further, there was no clause in the letter of offer dated 18th November 2014 stating that the Title Deeds given to the Bank by the 1st and 2nd plaintiffs to secure borrowing should be released to them. The latter letter of offer was to the 3rd plaintiff and not the 1st and 2nd plaintiff.

32. I also note that the Logbooks were not securities under the letter of offer dated 24th September 2013 and were given to secure facilities to the 3rd plaintiff. That is why when a meeting was held between the 1st plaintiff and representatives of the Bank, Mr Martin Gikunda and Mr Reuben Shitanda, to review existing facilities, a specific request was made to release the logbooks as part of the terms of renegotiation of the terms of the facility to the 3rd plaintiff. This was evidenced by the letter dated 25th October 2014 from the Bank to the 3rd Plaintiff titled, "REVIEW OF FACILITIES AND RELEASE OF LOGBOOK" which noted the request by the plaintiffs to release the Logbooks. The Bank acceded to that request and the Logbooks were collected by the plaintiffs' agent. The issue of release of the Title Deeds held on account of the facilities advanced to the 1st and 2nd plaintiff never arose at that meeting and was not addressed in the letter of offer dated 18th November 2014.

33. I therefore find and hold that the title deeds for **KAJIADO/KAPUTIEI/10874** and **LR 127115/8249** were deposited as securities under the letter of offer dated 24th September 2013 for facilities offered to the 1st and 2nd plaintiffs. I also find and hold that the conditions under which the titles were held were not varied by the letter of offer dated 18th November 2014 addressed to the 3rd plaintiff. Thus there is no basis for granting the declarations sought by the plaintiffs in prayers (a), (b), (c) and (d) of the plaint.

Whether the plaintiffs are indebted to the Bank

34. The plaintiffs do not deny that they entered into agreements for the facilities I have set out in paragraph 4 above. In order to support its case that the plaintiffs were indebted to the Bank, DW 1 testified and produced statements. These statements, the letters of demand and correspondence on the matter were part of the agreed bundle of documents. Moreover, there were letters dated 24th July 2015, 10th September 2015 and 13th October 2015 admitting that the plaintiffs were indebted to the Bank and they needed the Bank to release the Title Deeds in order to dispose of the properties and settle the debt. Further, the letter of offer dated 18th November 2014 was an acknowledgement that the 3rd plaintiff was indebted and that is why the facilities were restructured.

35. The issue then is to what extent the plaintiffs are indebted to the Bank. I agree with the plaintiffs' that the claim by the Bank is in the nature of special damages which must be pleaded and proved to the required standard. This aspect of the law is well settled and does not require any elucidation (see for example *Idi Shabani v Nairobi CC* [1982 – 88] 1 KAR 681 and *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] 2 KLR 269).

36. The plaintiffs contend that the amount of Kshs. 235,665,639.61 due and owing as at 6th April 2017 claimed in the counterclaim differs from the amounts alleged to be due in the statements produced in evidence. They submitted that the statement captures the amount due as at 30th November 2017. Counsel for the plaintiff's submitted that DW 1 conceded that the sum of Kshs. 24,479,143.43 claimed in the plaint was not reflected in the statements. He further submitted that the claim ought to be limited to what was claimed and not what in the words of DW 1, "The figures in the statement are different from those in the Counter-Claim. The figures keep changing."

37. In response, the counsel for the Bank pointed out that the statements were requisitioned on 6th April 2017 and availed on 4th December 2018 and when the amended defence and counterclaim was filed on 28th January 2018, the amount had increased significantly due to the interest and penalties charged on each facility hence the difference.

38. I have reviewed the statements produced in evidence. Since the additional sums were not reflected in the statements, I will award the amount due as at 31st March 2017 as this is reflected in the statement. The plaintiffs did not have the opportunity to challenge or review any other amount not contained in the statement. The statement of account for the 1st and 2nd plaintiffs as at 31st March 2017 was Kshs. 21,911,090.33 and on the interest account was Kshs. 1,047,794.94 making a total of Kshs. 22,958,884.42. The Bank claimed that interest at the rates applicable to the facilities. Under the letter dated 24th September 2013, the rate of interest under Clause 5.1 was 16% per annum. I therefore enter judgment on said sum with interest at 16% per annum from 1st April 2017 until payment in full.

39. As regard the 3rd plaintiff, the loan account shows that the it was indebted to the Bank in the sum of Kshs. 124,508,883.05 as at 31st March 2017 while the overdraft account showed that Kshs. 89,691,005.09 was due on the same date. The consolidated amount was Kshs. 210,199,888.14 as at 31st March 2017. Under Clause 5.1 of the letter of offer dated 18th November 2014, the interest on both the overdraft and term loan was 16% per annum.

40. At the end of the day, I find that the statements of account produced by the Bank were a true reflection of the plaintiffs' indebtedness. The plaintiff did not point out in what manner the statements were defective and when asked, in cross-examination about the statements, he stated that, "I have consulted a Consultant to review the statements and come up with an appropriate figure." Unfortunately, such report was not produced.

Conclusion

41. For the reasons, I have set out above, I enter judgment as follows:

(a) The plaintiff's suit be and is hereby dismissed.

(b) I allow the Defendant's Counterclaim and enter Judgment as follows:

(i) Judgment for Defendant against the 1st and 2nd plaintiffs jointly and severally for Kshs. 22,958,884.42 due and owing to the Defendant as at 31st March 2017 together with interest at 16% per annum from 1st April 2017 until payment in full.

(i) Judgment for the Defendant against the 3rd plaintiff for Kshs. 210,199,888.14 as at 31st March 2017 with interest therein at 16% per annum from 1st April 2017 until payment in full.

(c) The Defendant shall have costs of the plaintiffs' claim and the counterclaim to be agreed upon or taxed.

DATED and DELIVERED at KISII this 20th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya, Onchwangi and Ochwal Advocates for the plaintiff.

Ms Ndirangu instructed by Coulson Harney LLP Advocates for the defendant.